UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products Liability Litigation,	File No. 08-md-1943 (JRT/AJB)
	Minneapolis, Minnesota August 6, 2012 1:50 P.M.

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs: **RONALD S. GOLDSER, ESQ.**
CHARLES H. JOHNSON, ESQ.

Via telephone: **GENEVIEVE ZIMMERMAN, ESQ.**
LEWIS J. SAUL, ESQ.
KEVIN FITZGERALD, ESQ.
ROBERT BINSTOCK, ESQ.
KRISTIAN RASMUSSEN, ESQ.
ERIC TERRY, ESQ.
WILLIAM BROSS, ESQ.
DIANE ELLIOT, ESQ.

For the Defendants: **TRACY J. VAN STEENBURGH, ESQ.**
JOHN WINTER, ESQ.

Via telephone: **JAMES IRWIN, ESQ.**
WILLIAM ESSIG, ESQ.

Court Reporter: **KRISTINE MOUSSEAU, CRR-RPR**
1005 United States Courthouse
300 Fourth Street South
Minneapolis, Minnesota 55415
(612) 664-5106

Proceedings recorded by mechanical stenography; transcript produced by computer.

1:50 P.M.

(In open court.)

THE COURT: You may be seated. Good afternoon. Civil case number 08-1943, In Re: Levaquin Products Liability Litigation.

Let's have counsel note appearances.

MR. GOLDSER: Good afternoon, Your Honor. Ron Goldser for plaintiffs.

MS. JOHNSON: Charles Johnson for plaintiffs.

THE COURT: Okay. And then for defendants here in the courtroom?

MS. VAN STEENBURGH: Tracy Van Steenburgh on behalf of defendants, Your Honor.

MR. WINTER: John Winter for defendants. Good afternoon, Your Honor.

THE COURT: Good afternoon to both of you. And who do we have on the telephone?

MR. SAUL: Good afternoon, Your Honor. Lewis Saul.

MR. FITZGERALD: Hello, Your Honor. Kevin Fitzgerald for plaintiffs.

MR. BINSTOCK: Hello, Your Honor. Bob Binstock for plaintiffs.

MS. GENEVIEVE ZIMMERMAN: Good afternoon, Your

Honor. Genevieve Zimmerman for plaintiffs.

MR. TERRY: Eric Terry for plaintiffs.

MR. BROSS: Hello, Your Honor. This is Bill Bross for the plaintiffs.

MR. IRWIN: Good afternoon, Your Honor. Jim Irwin for defendant.

MR. ESSIG: Good afternoon, Your Honor. Bill Essig for defense as well.

THE COURT: Okay. Very good. Thank you. All right. Anybody else?

MS. ELLIOT: Good afternoon, Your Honor. This is Diane Elliot. I'm appearing on behalf of Ryan Thompson for plaintiffs.

THE COURT: Okay. Very good. Thank you. If any of you on the phone can't adequately hear us, please let us know, and we'll make adjustments here so you can. Thank you for joining us.

Okay. We have a request that if you're not talking, if you mute it, then we won't hear any background noise, and that would be helpful for us. Okay?

All right. Mr. Goldser?

MR. GOLDSER: Thank you, Your Honor. We have a fairly simple agenda today and fairly standard in many respects. We start with the status in federal and state courts, first with the count of cases?

Mr. Essig or -- Mr. Essig.

MR. ESSIG: Good afternoon, Your Honor. Really no change since our last status. There is one additional case served that's pending in the MDL that was transferred, so we're up to 1780 cases, and similarly, the New Jersey case count I'm told has not changed since our last status on July 17th, and there are 1563 cases.

THE COURT: And do we still have the pending cases in other jurisdictions?

MR. ESSIG: We do, Your Honor. As mentioned last time, there are two cases pending in state court in southern Illinois that at least currently have a September trial date, although there are motions for summary judgment pending in those two cases, and so I'm not sure if that trial date will hold.

THE COURT: All right. Thank you, Mr. Essig.

MR. GOLDSER: And I was, in fact, going to mention the summary judgment in Illinois under status of Illinois cases, so we now know what that is. There was a status conference held in New Jersey right after the last status conference here. I don't believe any cases have been yet selected for trial there.

I think there is still some more effort going to be put in to try and identify some additional cases for trial, but I don't think there is anything of major import

that is new in New Jersey.

Is that accurate?

MR. WINTER: Close. They have to have a new plaintiffs' liaison committee constituted in New Jersey. Those submissions are being made to Judge Higbee this week. Next week, both sides submit --

THE COURT: Is the microphone on there? We have got people on the phone, so just --

MR. WINTER: Sorry. Next week both sides submit groups of four cases to Judge Higbee for consideration for bellwether discovery. There is a conference August 23, at which time Judge Higbee will decide which group of eight cases go for further discovery, and she will set a trial date and all the other discovery cutoffs that would follow from that.

It looks like a spring 2013 trial in New Jersey.

THE COURT: I see. How many cases is she intending to try? How many plaintiffs?

MR. WINTER: Judge Higbee has not said that.

THE COURT: Okay.

MR. WINTER: She has given the parties direction as to the groupings of four cases for each side, but she has not said whether it will be one or two plaintiff or more plaintiff trial.

THE COURT: Thank you, Mr. Winter.

MR. GOLDSER: Next item on the agenda is defendants' motion to prohibit ex parte communication with treating physicians.

MS. VAN STEENBURGH: May it please the Court. Mr. Goldser. This is defendants' motion, Your Honor, to limit, not deny access, to have certain communications by plaintiffs' counsel with some of the treating physicians in Minnesota, and again, I'm careful to say to limit communications, not to deny access because that is not what we're trying to do.

We have had here are, we have had three cases that have been trialed and numerous depositions for those cases where plaintiffs' counsel have clearly provided information about litigation, litigation theories and the defendants' defenses. I would like to give you just three examples and what really brings us here today for this motion.

In the Christensen case, Dr. Clark was the prescribing physician, and when I took his deposition, I learned that plaintiffs' counsel had prepared and given to Dr. Clark some articles, scientific articles, and also some of the, two of the studies -- the Aventis studies, neither of which were published, were provided to Dr. Clark, and also the April 2002 interim MCA report by the assessor was provided to Dr. Clark, all for the purposes of talking to

Dr. Clark and getting his opinion and preparing him in the event that they could get him to say something about comparative toxicity in line with the plaintiffs' theory on comparative toxicity.

As it turns out, Dr. Clark said he hadn't really read any of those articles, and he wasn't familiar. These are not things that he would normally see and declined to pursue that. I believe the plaintiffs were not able to talk with Dr. Clark, but this was the kind of activity in which the plaintiffs engaged in order to get information to a prescribing physician to advance their theories.

It happened again with Dr. Baniriah, who as you will recall is the prescribing physician in the Straka case, and I again took that deposition, and during that deposition, it was clear that Dr. Baniriah and Mr. Goldser had talked beforehand. It was admitted that they had had lunch together and talked about the case.

And at one point there was a question asked: Question: Did anyone ever tell you that the risk of tendon disorder with Levaquin was greater than with any other flouroquinolones?

I objected, and then the question was: All I want to know is, Has anyone ever told you that fact other than perhaps me?

And so it was clear that Mr. Goldser had told

Dr. Baniriah about this comparative toxicity theory that plaintiffs were advancing in the case. It was also clear during the deposition there were a couple of times where questions were asked of Dr. Baniriah where she looked at Mr. Goldser for an answer in connection with the question.

There were discussions that were had beforehand. Information was provided to her. I mean, she had a copy of the black box warning and testified that she thought maybe she hadn't seen it until the litigation, so she was given that as part of the litigation.

That's where we're moving is that there is the ability of the plaintiffs' counsel to talk to a treating physician, a provider, about the medical diagnosis, the treatment; but when it becomes litigation interests, we think that is crossing the line.

And the biggest example of that, of course, was Dr. Ryberg during the Straka trial, and I think the Court may recall that in the Straka trial, Dr. Coetzee, who is the orthopedic surgeon who had not seen Mr. Straka for some time, had an appointment with Mr. Straka, examined him, was concerned there might be a neurologic issue, referred Mr. Straka to the Noran Clinic.

Dr. Ryberg then conducted an EMG on Mr. Straka, and the results of that were provided. Mr. Straka, interestingly enough, was told to go back to Dr. Ryberg for

an interpretive progress note meeting appointment, and Mr. Straka did go back. And then miraculously, there was a report that came out on December 21 of 2011, and -- or '10, and it was the report that Dr. Ryberg had prepared in between taking the EMG and having talked to Mr. Straka.

The report, which was purportedly a medical record which normally would have gone to Dr. Coetzee, was never given to Dr. Coetzee, was given to Mr. Straka, who then turned it over to his attorneys. It was at that point between the EMG and the report that the lawyers got involved.

And the lawyers then, it became more of a litigation interest than it was a medical interest, and the lawyers became more involved in the treatment concerning Mr. Straka than a mere healthcare provider, and as the Court recalls, we asked to take Dr. Ryberg's deposition because we had never seen that report.

We were told it was not an expert report. It was merely a medical record, but when we tried to take Dr. Ryberg's deposition, he was conveniently out of the country, and we were never able to do that, and eventually the plaintiffs gave up.

But that is where it really caused us great concern that things were moving from merely talking ex parte to physicians about the medical treatment and care of

a plaintiff and moving into the litigation interests, and we are very aware of the Minnesota statute that prohibits defendants' counsel from talking ex parte with treating physicians. That's well and good.

We're not here to assert that the plaintiffs cannot do the same, but when it moves into litigation interests, and I find of particular interest that there actually has been some commentary and some thought put into this by the AMA and the ABA.

They have actually issued a joint statement where they indicate that it's perfectly acceptable for plaintiffs' counsel to talk with the treating physician. However, it undermines the integrity of both professions, according to the AMA and the ABA, if the line is crossed. It becomes something akin to litigation interest.

If there is going to be an abuse of the medical provider or where there is an attempt to seek to influence the medical opinion of the medical provider, then that crosses a line, and both the AMA and the ABA suggest that that's improper conduct.

Now, all we're trying to do by asking that the Court order the plaintiffs' counsel not to go into theories and show defense documents from the company or show documents such as the reports from the Aventis or the assessor's report or the MCA report, many of those kinds of

documents, or even scientific articles is because it does cross into litigation interests, as opposed to finding out what it is that the doctor did, what the treatment was, what the doctor thought, even causation which a doctor may testify to.

But if it's all couched in terms of what the litigation is all about, what the interests are, what the plaintiffs' interests are, what the defense theories are, it becomes, it can cross over into expert witness testimony, especially if you give a doctor scientific articles and other information that you want them to review and evaluate within the context of plaintiffs' theory.

And that in our mind is crossing the line, and it's not fair. All we're trying to do is level the playing field here so that everybody has a chance to present their view of the case at the appropriate time. I know the plaintiffs say, well, you know, you'll have plenty of a chance -- you'll have plenty chance to cross-examine the treating physician.

But if you only get there at the deposition where that treating physician has already been coached, has already been talked to by the plaintiffs' attorneys and we are finding out for the first time what they have looked at, it's very difficult to cross-examine those treating physicians at that particular point in time. The

plaintiffs have already been down the road.

Interestingly, and we don't have any evidence of it in this case, but in the *Pelvic Mesh* case, which I will talk about in a second, the argument there is that the plaintiffs want to be able to say to the doctor that, oh, the defendants are going to blame you, doctor, for this, and that is really setting the doctor up to be potentially a hostile witness.

And those are the kinds of things we want to prevent by keeping the plaintiffs from going any further than talking to the doctor about medical opinions, treatment, even causation and what is going on with this particular plaintiff.

I know that the plaintiffs have cited to Judge Higbee's order in the *Accutane* case, but as we put in our reply, that opinion where she has said it's perfectly fine for the plaintiffs' attorneys to gain the interests and opinions from the doctors has been resoundingly rejected by the New Jersey Supreme Court.

In a different case that was addressing some of the same issues, the Court said it is not the duty of a doctor to aid their patients' interests in litigation. We will not let the Court or plaintiffs' attorneys go that far to assist patients in the interests of litigation.

Now, the last couple days it's very interesting

because in the *Pelvic Mesh* MDL, a court did issue an order there, and I have looked at that very carefully, and with all due respect, I believe that the Court is just wrong with respect to the reasoning for allowing the plaintiffs unfettered access for the purposes of providing documents or medical information, other than what's in the medical record, to the physicians in those cases.

First of all, it's interesting because even though the sales representatives -- and this is cited as one of the reasons. The argument the plaintiffs had is, well, look, the sales representatives get to talk to the doctors when they are there detailing the product, but that's not a litigation context.

The sales representatives are there talking about their product. They aren't setting it up in terms of the litigation context where they're going in to talk to the doctor saying, hey, your patient has sued, your patient has gone after the company here for a defective product. It's a very different context, and it's not the same kind of ex parte contact that we're seeing with respect to litigation interests.

There is the second point which the Court in the *Pelvic Mesh* order noted is that there was an argument that maybe there is going to be an issue with blaming the physicians. Well, if that's the case and the plaintiffs

are trying to scare the physicians, then that is going over the line also, and it becomes more litigation interests than getting to the truth and the medical opinions of the doctors.

And the third thing that the Court in the *Pelvic Mesh* case said which really surprised me is that the plaintiffs have an ability and have a right to prepare their witnesses. I don't believe, and I do take the position, that treating physicians are not the plaintiffs' witnesses. They are not there to be the plaintiffs' witnesses.

Yes. There is a patient/doctor relationship, but the doctor is there to give objective, truthful information and not necessarily be an advocate on behalf of the plaintiff, which is again what the New Jersey Supreme Court said in connection with Judge Higbee's order.

Then finally, the Court in the *Pelvic Mesh* case talked about the fact that really these treaters are not experts. There was a request by Bard in that case saying, look, they're being provided information. They are being asked to give their opinions, which is happening in our cases as well, and the Court said, well, we're not going to make them do reports. This is not a 26(a)(2)(B) situation.

However, what the Court didn't talk about there is, treating physicians are experts. They can be experts,

but it's under 26(a)(2)(C). They do not have to furnish a report, but they do, the plaintiffs do have to disclose them, and they have to disclose the opinions upon which the treating physicians are going to provide at trial.

And what we have now are situations, such as with Dr. Clark, where they're being provided all kinds of scientific evidence, company documents, all kinds of other information and being asked to give an opinion as to the plaintiffs' theory on comparative toxicity, and that really goes over the line. They're asking those witnesses to become experts for them without going through what's required under the rules.

So, again, it's perfectly legitimate for the plaintiffs to talk to the treating physicians to find out what they did, what their views are, what they know about the product, those kinds of things, but it really crosses a line when there is discussions about what the litigation is about, what the claims are, even giving them labels much later, having compare all the labels and say, this is what the theory is, this is how we're proceeding, giving them company documents, giving them scientific articles of which they would not be aware because that really crosses the line and becomes something that is an advocacy piece for these doctors as opposed to getting information and having doctors testify as a fact witness.

With that, Your Honor, we would ask that you order them to limit their communications.

THE COURT: Thank you, Ms. Van Steenburgh.

Mr. Goldser?

MR. GOLDSER: I have lots of places I could begin, so I guess you're going to hear a number of different beginnings. Let me start with this one:

If I understand this argument and this motion currently, plaintiffs are allowed to communicate on an ex parte basis with treating physicians. That's conceded. Plaintiffs are allowed to communicate with -- on an ex parte basis with treating physicians about the medical care and treatment of the patients.

Plaintiffs are also allowed to retain treating physicians as expert witnesses so long as the rules about providing opinions is followed, and I think it follows that if plaintiffs are allowed to present treating physicians as expert witnesses, there are two different kinds of expert witnesses. One is a testifying expert witness, and one is a consulting expert witness who doesn't testify.

And in the situation of the expert witness, the expert witness can be shown company documents and can be asked questions about comparative toxicity or various other expert types of issues, and so in deciding from any party's perspective whether a given person is an expert witness,

the first thing you have to do is sit down with them, talk to them about the case, ask them the questions and decide whether that person is an appropriate expert witness.

So it would seem to me that if I'm thinking about having one of the treating physicians be an expert witness, and causation is certainly one of the areas where expertise is appropriate in these cases, I get to ask all of those questions about causation or any other opinion about which that physician could testify.

And in fact, if you remember, I think it was in Schedin. I think it was a doctor by the name of Lance Silverman, and I think it was also -- no, it wasn't Dr. Silverman. It was Dr. Anthony Smith, Dr. Beecher's partner.

I think we were inquiring of him about various opinions, and defendants squawked mightily about the fact that we hadn't followed Rule 26, and they said this treating physician is in fact an expert witness.

Well, if they are a fact witness or an expert witness, you can have them as one or the other or both, and that would entitle whoever is retaining that expert to inquire of that expert about all of the stuff that defendant is now complaining about. It seems they have conceded that point.

It seems that the motion should be denied. I can

sit down, but I said I had a bunch of other beginnings, so I'll give you some of the other beginnings, too. The slippery slope of a ruling in favor of the defendant on this is horrific. Several reasons. One is, where is the line between what constitutes talking about a patient's medical care with talking about expert testimony?

The Minnesota statutes that give patients rights to talk to their treating doctors about risks, benefits and alternatives certainly seems to be a statute that discusses medical care, and so if I want to talk to a given prescribing doctor about risks, benefits and alternatives, I say, well, Doc, you know, your patient came in to you for this condition, and you decided to prescribe Levaquin. Do you still do that today? Has your risk/benefit analysis changed?

Is that a medical question, or is that an expert question? Where is the line? Were you aware in 2001, '2, '5, '9, whenever of these certain risks of Levaquin, it is more toxic, greater risk in the elderly, greater risk with corticosteroids. Were you aware of that? If you knew then what you know now, would the balance of risks and benefits be different? Is that a medical care treatment, or is that an expert question?

So that's one issue. Where is the line? The second is, what if you do this, doesn't this opinion then

extend to nonphysician witnesses? Do I as plaintiff in investigating my case on behalf of my client get to go out to a third-party witness and ask them questions or not? Do I have to fear that the defendants are suddenly going to interfere with my investigation of my case or not?

Do I get to under the appropriate confidentiality rules show such witnesses documents that have been produced in litigation, assuming I follow those confidentiality rules and ask for feedback on those or not? I mean, the slippery slope in that arena is horrific.

I mention in the last paragraph of the brief, and some people on my side thought it was kind of odd to put it in, but does defendant get to talk to their own employees without plaintiffs present? I mean it gets to that kind of craziness. It would be a crazy order. You can't find the line with doctors. You can't find the line with other witnesses.

But it gets even easier than that, Judge, to deny the motion. I listened very carefully to Ms. Van Steenburgh's argument. I was listening for the legal authority upon which her motion is based. What law allows them to get this relief? What law prohibits me from speaking to treating physicians if the treating physicians are willing to speak to me, and as you have heard over the last several status conferences, they're not exactly

thrilled about my coming into their office, either.

But assuming that they'll let me in the door, what law, what rule of court, what rule of evidence prohibits my conduct? What rule of ethics prohibits my conduct? In fact, don't the rules of ethics require that I investigate the case? Judge Higbee said, the judge in the Bard *Pelvic Mesh* federal MDL said plaintiffs should go talk to these doctors because if the doctors give the wrong answers, you know, Mr. Lawyer, I'd have given that drug anyway. I don't care what I would have been told. It was the right drug under those circumstances.

A reasonably intelligent plaintiff lawyer would say, Client, your case isn't going to go anywhere. Doesn't it make sense to find that out early on before we go through all of this? Criticism is made of Judge Higbee's order in Accutane based on the *Pelvic Mesh* appellate decision in New Jersey.

You'll see, Judge, and again, tip of the iceberg of it in this motion, but it seems like there are various kind of theories that the defense institute kind of rolls out everywhere across the country, and this is one of them. There are two things that are happening simultaneously.

Defendants are seeking to get permission to use plaintiffs' expert -- plaintiffs' treating doctors as expert witnesses and the permitted ex parte contact in

order to do that, and second, defendants are seeking to exclude ex parte communication by plaintiffs with their own doctors, the motion that we have here.

The first one, defendants seeking to have ex parte communication with treating docs to retain them as experts happened in the state court *Pelvic Mesh*. It also happened in the *Zimmer* high flex knee, which is under advisement in the federal MDL in Chicago. It was that motion which was decided by the appellate court in New Jersey.

It was not a motion or an order by Judge Higbee precluding plaintiffs' ex parte communication with docs. So the procedural posture of the issue that is raised in the state court *Pelvic Mesh* decision is completely different from what we've got here.

Even assuming Judge Higbee's references in her Accutane order, which is the same order as here, were inappropriate based on the AMA/ABA ethics, that part of Judge Higbee's decision was one paragraph out of the entire order. The rest of the order rested on a number of different theories and policies why Judge Higbee said, yes, plaintiffs can have ex parte communication and denied defendants' motion.

And the same policies and practices were what undermined and supported -- underlined, not undermined,

underlined and supported the decision in the federal *Pelvic Mesh* decision. So at the end of all of this, defendant has no law, no rule, no regulation, no ethics, no evidence, no case law where they have ever succeeded in getting the relief that they are asking for here. You should not be the first.

Thank you.

THE COURT: Mr. Goldser, have you looked at the restrictions or limitations, I should say, it's more a limitation than restriction, on interviews with doctors from NuvaRing and from Vioxx?

MR. GOLDSER: Yes, and I think I commented on those in our responsive brief, and now you're going to test me because I forgot what I said. One of those was a stipulated order, and so, you know, I don't see that as a contested order.

The other was I believe something to the effect that communications about medical care were permitted, and I don't remember what the other --

THE COURT: Well, it was, and I think also repeated in *Ortho Evra* products liability litigation, must tell the providers interviews are voluntary and can be declined. The provider must be presented with the necessary medical authorization, and the interview should be limited to the particular plaintiff's medical condition

at issue in the current litigation.

MR. GOLDSER: I certainly don't have a problem with authorizations. That's appropriate. We always make clear that it's voluntary, and doctors know it's voluntary, so I don't have a problem with that. I do have a problem with the third one for a couple of reasons. One is, as I've cited, I don't know where the line is in what's medical care and what's litigation.

And second, even if I know where that line is, it is critical for the doctor to have the context into which their factual recitation is going to be put. For me to show up and say, Doc, I want to talk to you about Mrs. Smith's medical care when she received Levaquin, tell me what you saw, what you did and all the rest of that. What do you want to know for? Well, I can't tell you. The judge said I'm not allowed to tell you.

What we have done is, we have provided materials that are not complete to doctors but certainly exemplary of both sides. I have made sure that in all circumstances that when I provide some of the medical literature, I provide a copy of the Ingenix study without fail because, number one, I don't want to be criticized for being biased; number two, I know the doc is going to get cross-examined on that.

It doesn't make sense for me to do otherwise. If

I am completely one-sided in my approach, the doc is going to get blind sided by the cross-examination. You know, shame on me if I do it any other way, so I don't know where that line is.

I'm happy to have a requirement that my -- the information I provide be as neutral and complete as it can be, but I don't think I should be precluded from talking to the doctor about what the litigation is, what it's about, what information I'm seeking and where it fits into the context of that litigation.

You know, do I need to ask the magical question at the end of it? Of course I need to ask the magical question. Would you have done different today from what you did then based on what you know now? If I don't ask that question, it doesn't help much because I can find out early on whether the case is worth going forward.

We have a bunch of cases to get ready for trial. I can try to eliminate some of those cases if the doc's answer is the wrong answer. So it is a long answer to your question.

THE COURT: That's fine. Thank you, Mr. Goldser.

MS. VAN STEENBURGH: Let me respond to something Mr. Goldser said right at the very end. Yeah, he asks the ultimate question, but that's after providing the doctor with all kinds of information and framing it for the doctor

and saying, here are the scientific articles, here is the black box warning which really wasn't in effect at the time, but now that you know that it's in effect, what would you have done had the black box warning been in effect in this time.

And so it's feeding the doctor with information that the doctor ordinarily wouldn't have, and I'll tell you. There is a definition of litigation interest. Mr. Goldser said I have no idea what those are. They're defined by the American Medical Association as quoted by the superior court:

Litigation interests are established by attorneys or the patients themselves. Those interests are not identified by medical professionals in the course of treatment. So there is a difference between medical interests and litigation interests, and what we're getting at here is, there is a line that gets crossed when the plaintiffs are allowed to talk to the physicians.

Admittedly, it's a difficult situation, you know. Mr. Goldser says, oh, well, it can be any fact witness. Physicians are in a very different position than any particular fact witness. The physicians are in a position where they have a special relationship with the plaintiff, and they also may have opinions relative to causation that some other fact witness might not have.

And to provide those witnesses with information, and frankly, before I go on, Mr. Goldser is right. The statute talks about or there are provisions that talk about, opinions about medical treatment and even causation, but you can't then give the doctor the framework of the litigation and say, here is what our theories are, here's what the defense theories are, here's some additional information, and what do you think about this, and will you offer an opinion on this particular issue.

Then it crosses into expert witness testimony, and frankly, in the Schedin case, it was Dr. Silverman. Dr. Silverman was a fact witness. He is an orthopedic, and he came in, and I asked Mr. Goldser, is he going to testify about causation and whether Levaquin caused these injuries. He said, yes, and I said, where is the disclosure, where is the information because Dr. Silverman in his deposition did research, looked at articles on it, talked to Mr. Goldser or else Mr. Fitzgerald about it and was going to render an opinion.

And when we had not gotten those disclosures under Rule 26, they dropped it, and he never testified as to his causation opinion. So there is a distinction. The distinction is well-known by the plaintiffs and the defense lawyers. It is not a slippery slope. It is not an unusual territory.

And going to that first point, you know, one of the things that Mr. Goldser said, you know, we're allowed to communicate. We're allowed to retain some of the treaters as experts. That's right. So once you start furnishing them with company documents, scientific articles, internal documents by Aventis, things from the MCA, all the different labels, have them compare them, that's right. You start to turn them into expert witnesses, and that's when you need to disclose it.

The other thing that we're running into is, we get into the deposition, we don't know what has been disclosed to the doctor. We finally get there, and we see what has been disclosed. It's interesting, Mr. Goldser says that he always gives kind of an even set of documents.

In all the ones I've taken, the only other document that I've seen that might be in that category is the Seeger document, and I have no doubt that Mr. Goldser or someone else says, wow, this is a really bad study and here's all the reasons why. So that's the balance. That's the only one.

Otherwise it's Fleisch and Wilton and every other article that we have seen Dr. Bisson testify about during the trials. So it does become a position of where it crosses the line, and I do think the plaintiffs know where that line is, but there is no legal authority? Your Honor,

it is within the Court's discretion, and I think that the courts in *Ortho Evra* and in the *NuvaRing* cases, even though there was a consent in *NuvaRing*, the parties knew in that case that the Court has the discretion to put some limits on some of these contacts.

Again, we're not asking for them not to have access, but there can be pretty well-defined limits, as there are in those two orders, that would allow us to have some boundaries so everybody is on the same playing field.

THE COURT: So the limitations in those cases are limitations that you think are appropriate?

MS. VAN STEENBURGH: I need to look at the language exactly, and if the Court wanted us to, we could actually draft a proposed order in terms of what that proposed language would be.

THE COURT: The critical language, I read each of them, but I think it is that the interview should be limited to the particular plaintiff's medical condition at issue in the current litigation.

MS. VAN STEENBURGH: That's essentially what we're asking for.

THE COURT: That's I think --

MS. VAN STEENBURGH: If in fact they're going to give them other information and they want to talk to those doctors and have them review things, then they need to

disclose them as experts in that context. I have those cases, but I think they're still sitting on my desk, so I don't have the language.

THE COURT: I think the latest one is from the Ohio one. The Ortho Evra products, Specifically plaintiffs' counsel may meet ex parte to discuss the physician's records, course of treatment and related matters but not as to liability issues or theories, product warnings, defendant research documents or related materials.

MS. VAN STEENBURGH: Yes.

THE COURT: That seems to go a little bit farther.

Anything else, Mr. Goldser?

MR. GOLDSER: Where in the scope of that does a discussion about risks and benefits and alternatives fall? If a patient has a statutory right in Minnesota, which was not discussed in *Orth Evra* or *NuvaRing*, and maybe that statute didn't exist there, but if a Minnesota plaintiff, a patient has a statutory right to discuss with his treating physician risks, benefits and alternatives, is that a discussion of medical condition, or is that a discussion of liability? Which side of the line does that fall?

I thought it fell in the line of, I can talk about it in the context of the *Ortho Evra/NuvaRing* orders.

THE COURT: Thank you.

Go ahead.

MS. VAN STEENBURGH: The only comment I would say, Your, Honor is what he's quoting from is that there is a right to talk about risk, benefits and all, but that's during the treatment. That is not an after the fact kind of thing. What Mr. Goldser is saying here, I would not be able to talk to them about risk/benefits and give them information and ask what their opinion would be.

That then crosses into the expert witness category. The statute he's talking about is talking with a patient about those risks and benefits and assessments and medical treatment, so it's a slightly different context.

THE COURT: Okay. What's next on our agenda?

MR. SAUL: Your Honor, may I comment briefly? Lewis Saul.

THE COURT: You may.

MR. SAUL: Thank you, Your Honor. A ruling in defendants' favor in this matter would be inconsistent with what Judge Higbee ruled in *Accutane* and which she would presumably hold in Levaquin. So in New Jersey when we try cases, we're allowed to speak to the physician. In Minnesota, we would not be allowed to speak with the physician.

Additionally, clearly there is no case been

decided in Minnesota which Ms. Van Steenburgh has raised precluding plaintiffs from speaking to other physicians. In the event Your Honor ruled in such a way, we tried the case, and the Court of Appeals said that that's not the law in Minnesota, we would have to retry the case.

Additionally, as both Mr. Goldser and Ms. Van Steenburgh are speaking, I was thinking back to our three trials, and in those three trials, I would say the main issue for the prescribing doctor presented by the defendants was, what did the doctor know and when did the doctor know it.

For instance, the PDR, the package insert, were you aware, Doctor, of the tendon issue relating to Levaquin? That's the main Power Point. We're not allowed to ask the doctor was he aware of such, such a warning at the time he prescribed the medication or was he aware of the 2001 package insert change.

It's part of his medical decisions that he made why he did what he did, and as Mr. Goldser was stating, that line, that line actually can't be drawn, and we would be -- when we went and talked to our doctors, we wouldn't know what to say, what to ask. We would be in contempt of a Court order. There is no law in Minnesota.

There is very little law in other states, and we don't know whether their statutes are consistent with

Minnesota in the other states to support such a decision, and I suggest that the law as it now is that plaintiffs are allowed to talk to the prescribing physicians and to talk to them about any subject matter.

Thank you.

THE COURT: Thank you, Mr. Saul.

MR. GOLDSER: Next item on the agenda, number 4, is the order to show cause with regard to the forum non conveniens. Again, that's something that Ms. Van Steenburgh wants to address.

MS. VAN STEENBURGH: I'm not sure if this is just a report to tell you where we are or if we are going to need some help, Your Honor. Mr. Saul's office and I have been talking about an order to show cause. We have 1389 cases that were filed directly in Minnesota where the plaintiff resides or received the prescription or had healthcare treatment and suffered the injury elsewhere.

We are trying to see if there is a way to get everyone to agree on a mechanism by which we could make a determination as to whether some of those plaintiffs' attorneys want to transfer those cases voluntarily or under court order.

I had proposed an order to show cause. Mr. Saul's office would rather do it as a stipulation. Their proposal is that as co-lead counsel, they contact all

of the plaintiffs' attorneys. Those who will agree will stipulate, and then if the stipulation isn't before the Court 60 days after we finish the next trial, then we have to bring a motion to transfer.

It's good in theory, but it's not so good in practice because as we have seen with the PFSs, a lot of the plaintiffs' attorneys do not follow through. So I think what is going to happen, one, it's a big burden on Mr. Saul's office to contact maybe up to 1389 plaintiffs' attorneys.

I have no idea, but also there is a fear that we have. The stipulations won't roll in. We'll do a bunch of motions. It's going to clutter everything up, and suddenly the motions are filed, and we'll get a lot of plaintiffs' attorneys going, oh, yeah, forgot to send this in. We'll agree to transfer it.

We think it would be a better, easier mechanism for the Court to issue a show cause order and have them respond within X amount of time as to whether they are or aren't going to agree to transfer, and for those that they do not agree to, we will bring our motion.

We're at a little bit of an impasse. I'm not asking the Court to make a decision on this now. If you would like a letter brief or some information as to kind of what we are each proposing, I would be happy to have us do

that.

MR. GOLDSER: Mr. Saul will address this.

MR. SAUL: Judge, this us Lewis Saul.

THE COURT: Go ahead, Mr. Saul.

MR. SAUL: Thank you, Your Honor.

Ms. Van Steenburgh and I have been discussing this issue, and we're not opposed to voluntarily plaintiffs agreeing to transfer back to the forum in which plaintiffs presently reside. There is a number of other issues that we have been discussing, and we're trying to work this out.

If it is by show cause order, as Ms. Van Steenburgh is suggesting, we are opposed to such an order for a number of reasons, and if that's the case, we would suggest that we be allowed to fully brief this. Under 1404A transfer, plaintiffs' forum under *Gulf Oil* is given great weight, and what the defendants are attempting to do is shift the burden to plaintiffs to prove or to show that Minnesota is not the appropriate forum.

And you cannot -- and the defendants should not be entitled to do so. So if we can't reach an agreement, we would like to fully brief that issue.

MS. VAN STEENBURGH: I guess we'll brief the issue.

THE COURT: Okay. That's fine. Let's get that teed up as soon as possible.

MR. GOLDSER: Today appears to be Ms. Van Steenburgh's agenda primarily. The next item is listed as CTO 3.

I think you mean pretrial order number 3, don't you?

MS. VAN STEENBURGH: That's what I meant. Sorry.

MR. GOLDSER: The reassessment issue.

MS. VAN STEENBURGH: Mr. Winter will address that.

MR. WINTER: Your Honor, we have been carrying this issue for several months. We have reached a definitive agreement that is being signed with about 420 plaintiffs in New Jersey. So within 60 or 90 days, money probably passes hands, and you're going to have to rule on this dispute, which is on the plaintiffs' side, because if we don't get closure on that issue relatively soon, I mean, I don't want to have to file an interpleader action.

But you have an existing order which we obviously will honor and respect. It's just that I think we have come to the point where the plaintiffs have either got to come to an agreement and submit an agreed order to you, or whatever positions they want to assert to you, they've got to send them in to you pretty soon because time is becoming of the essence.

MR. GOLDSER: Thank you, John, for letting us

know the status of that. I really appreciate it, and I'm also glad to hear that no money will be disbursed until this is resolved.

I will report that we have had continuous negotiations among various groups of plaintiffs' lawyers. We have not been able to reach a consensus. I suspect that means that we will need your assistance in getting this issue resolved, and we look to you for help in how you would like us to get it resolved.

THE COURT: Well, how close are you? Are you a long distance apart? Has there been progress made? Give me a little bit more of what is going on.

MR. GOLDSER: There are two or three issues that seem to be somewhat intractable by various different groups of plaintiffs, and I would rather not on the record discuss what those issues are or who the parties are. If the Court wishes, I would be happy to do that off the record privately, but the point is, there are two or three issues that are, do not appear to be anything that we can cross the bridge.

THE COURT: Well, perhaps you should submit to me a letter ex parte describing those conditions, so I can give the matter some thought before thinking about what the next step is.

MR. GOLDSER: I would be happy to do that, and I

will copy the various groups who have positions on the issue.

THE COURT: All right.

MR. GOLDSER: I can do that probably later this week.

THE COURT: Okay. Good.

MR. GOLDSER: Next item is to talk about the upcoming trial in October and various scheduling issues. As the Court knows, plaintiffs have identified six cases. Mr. Bross, who is on the phone, has one. It's the Tomalka case, T-o-m-a-l-k-a.

THE COURT: I don't think I've seen the six cases. Was there a filing on that?

MR. GOLDSER: I wonder. Maybe not.

THE COURT: I don't think I've seen them.

MS. VAN STEENBURGH: I think it was just e-mailed to defense counsel perhaps.

MR. GOLDSER: I can certainly give you the file numbers. Those I don't have memorized, but Tomalka, T-o-m-a-l-k-a, is one. That is Mr. Bross's case. Magnuson is Mr. Johnson's case, M-a-g-n-u-s-o-n, and the other four are mine: Olive, O-l-i-v-e; Arnold, A-r-n-o-l-d; Mangin, M-a-n-g-i-n; and Bechler, B-e-c-h-l-e-r.

In Arnold, we took the prescribing -- the prescriber happens to be a nurse practitioner, her

deposition last Thursday. I know both sides are diligently ordering up medical records so that we can take the plaintiff's deposition and the treating doctors.

We have agreed that plaintiffs will update plaintiff fact sheets and defendants will update defendant fact sheets for all of these cases. And so, I mean, we are moving along as best and as well as we can in all of them.

I know that in Tomalka Mr. Bross, for example, will be speaking with the prescribing doctor tomorrow morning to get a date for a deposition. I know that Mr. Johnson is speaking with the office of the prescriber, Dr. Dashiell, to get a date for deposition.

In Olive, we have a date for deposition. That's not until the first week in September, and in Mangin and Bechler, we have been diligently trying to reach those doctors. As I told you on a number of occasions in the past, we are at the point where we will probably just send out subpoenas to make sure that at least they are on board.

Ms. Van Steenburgh proposed late yesterday a schedule for deadlines, and we talked about it a little bit in advance. To be sure there is going to have to come a point in time where we decide which case or cases will be tried.

And with the Court's permission, we think we can do that up to two weeks prior to the trial date so that by

October 8th, we will have identified the case or cases that can be tried by that time.

From my view, we will be working as hard as we can to get all of these cases ready, and some of them just will not be susceptible of being prepared due to delays of various kinds. I think for that reason, many of the cases will ultimately self select.

I think given that Arnold, the prescriber was done, and we're focused on that one, I think that one will be ready. I suspect that Magnuson and Tomalka, given that we're very close to getting those dates nailed down, can be ready. I'm a little concerned about Olive with a prescribing doc in September, but we will see where that one goes.

From my perspective, Ms. Van Steenburgh said well, why don't we have such and such as a cutoff for fact discovery and then deadlines for expert reports. I, you know, deadlines, we can set deadlines, and I can assure you that come around the time of them, some of them will be met, and some of them will need to be delayed by a week or so.

Obviously, we don't have a lot of room for delay. Some of the cases will just fall off the map for this trial. I was suggesting that we have a flexible schedule, knowing that October 8th, cases that are ready will be

identified as ready, and if we can't get any one or more of them ready by that time, then we will deal with that at that time, but we certainly intend to try to get as many of them ready as we can.

We recognize, of course, that not only do we have the depositions of plaintiff treaters, sales rep, we have case specific expert or experts, plural, on both sides to get ready and deposed. Happily, I expect many of the case specific experts will be the same as in prior cases, but not necessarily. So we've got a lot to do.

As you know, it would be my hope that we have more than one case tried. Some of the cases the injuries are more severe than others, and in some of the cases, we have plaintiffs who are older and may not be able to sit through the trial in their entirety, which as you know in Christensen was a problem.

I can see for some of those cases where the plaintiff can make an appearance, say on opening statement and closing statement and for their testimony, but not otherwise. It would be good to have multiple plaintiffs so that there is at least somebody there who can serve as a real live human being representative of plaintiffs so that if we try multiple cases we can have somebody do that on behalf of some people who can't stay for the entire time.

There are lots of reasons to try multiple cases.

We don't view it as bellwether. We view it as giving people their day in court. People are getting older. The health of people is getting bad to the point where they can't appear, and these cases are going to die by attrition, which would be very unfortunate.

Bottom line, October 8th let's get ready and identify what those cases are, and between now and then, everybody needs to do what they know they need to do as quickly as they need to do it without setting specific target deadlines because they're going to move.

MS. VAN STEENBURGH: And now for the rest of the story. The plaintiffs did identify six candidates for trial, and we thought that eight total would be a good number to work with to try to get them up for discovery. So we proposed two other ones, Carol Braaten and also -- I'm going to mispronounce the name -- Macizka is Mr. Saul's case, and Braaten was Mr. Johnson's case.

Each of those plaintiffs are not going to go to trial. Those cases are being dismissed, and so we then picked another case, the Lorenson case, and that case has now been dismissed. So we are continuing, and we have since picked two other cases.

And I believe Mr. Binstock is on the phone. One is the Sowada case, and Mr. Binstock is going to let me know whether we are going to move forward with discovery on

that in the next day or two, and the other one is the Jacobus Botes case, which is Mr. Saul's case, and I think Mr. Fitzgerald is going to let me know in the next day or so whether they are going to move forward.

If they don't, we will pick a couple of other ones, but we want to get to the end of that process so we can actually do the discovery and figure out with those eight cases which one is going to go to trial. We do have the depositions. We think we can get the depositions done for all of these.

We have agreed to update the DFS and PFS. We don't believe this is a good time to try multiple cases. It's going to be very difficult with one. When we look at the variety of issues involved that are here, the ages, the prescription dates, we have one there is a prescription in 2010. We have got another one there was a prescription in 2005. These are not the kinds of cases that should be tried as multiple plaintiff cases.

No offense to Mr. Goldser. It's even worse reason to say that some of the plaintiffs can't be here and have there be a plaintiff representing the plaintiffs in opening and closing. This is not a class action. This is not a representative case. Everybody, these are individual cases.

So I think that our position remains, Your Honor,

that there should be one case picked for trial, especially given the tight time squeeze that we are up against in an October trial.

MR. GOLDSER: I'm not sure that I have anything new to add unless the Court has questions on it.

THE COURT: Anyone else have anything to add on this point, telephone, anybody?

MR. BINSTOCK: I just got word that this case is being considered today.

THE COURT: Identify yourself if you could when you are speaking.

MR. BINSTOCK: Oh, this is Bob Binstock.

THE COURT: Just repeat what you said, Mr. Binstock.

MR. BINSTOCK: Oh, I just got word that this case was being considered, and I just need a couple days to look at it to determine whether or not we're going to go forward with it.

THE COURT: Okay. All right. Well, obviously, I would like to have the case or cases identified as quickly as possible. In terms of the schedule, it's looking like I have a number of different conflicts the week of the 22nd. So what I'm going to propose doing is just move this back one week to the 29th.

That gives a little bit more time for

depositions. I don't think it should alter anyone's preorganized schedule, and then we have most of that and the following two weeks available for a trial. So I think we'll do that as of today, just move it to the 29th, and I have some trial time the week of the 22nd, but it might be difficult to get it started that week.

All right. So what is the next step here? I understand this is a bit of a moving target. Do we have -- can I get a report in a week on where we're at on these cases?

MR. GOLDSER: Sure.

MS. VAN STEENBURGH: Either a week or toward the end of August we should let you know. Go ahead.

MR. WINTER: Maybe we give you a report next week, Your Honor, and then pick a day the last week in August for everyone to come back and see you again.

THE COURT: I think that's probably a good idea. Perhaps by the, maybe by the 16th of August could we get a report on where we're at on the cases?

MR. GOLDSER: Sure.

THE COURT: Okay. And then the last week in August is fine for a hearing. Let me just look here. 1:30 on Tuesday the 28th, would that work?

MS. VAN STEENBURGH: Fine on this side, Your Honor.

MR. GOLDSER: Works for me.

THE COURT: Okay. Let's be back on the 28th at 1:30, and meanwhile, the matters or the primary matter the Court has in front of it on the ex parte communications, the Court will issue a written order shortly on that, and I'll wait to hear from each side on the forum non conveniens issue.

And, Mr. Goldser, I'll hear from you on the assessment issue.

MR. GOLDSER: This week.

THE COURT: And we may need, once I get that, then I will decide what kind of process for hearing from the other parties in interest there. Okay?

MR. GOLDSER: Sounds good.

THE COURT: All right. Anything else for today?

MS. VAN STEENBURGH: No, Your Honor.

MR. GOLDSER: Yes, Your Honor. One other thing, actually. You had asked us to respond to defendants' brief on the plaintiff and defendants' competing drafts of the remand order, conditions precedent to remand, and we did file that.

So you have both parties' perspectives on that with the competing orders, a red lined version of the competing orders. There were really only three issues raised by the briefing. I don't know if you want to have

that on the agenda for August 28th and discuss it. I don't know if you want to give us your thoughts on it in the form of an order or even a tentative order on remand, how you would like to address that issue.

THE COURT: Let's take it up on the 28th.

MR. GOLDSER: All right. Sounds good.

THE COURT: Sounds good. Okay. We will be in recess. Thank you, everyone.

MS. VAN STEENBURGH: Thank you, Your Honor.

MR. SAUL: Thank you, Your Honor.

MR. ESSIG: Thank you, Your Honor.

* * *

I, Kristine Mousseau, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Kristine Mousseau, CRR-RPR
Kristine Mousseau, CRR-RPR